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No. - .

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1987.

FRANK FORASTIERE, CHAIRMAN OF THE BOARD OF FIRE COMMISSIONERS OF SPRINGFIELD,
PETITIONER,

v.

RICHARD J. BREAULT,
RESPONDENT.

Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court.

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January 7, 1988

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Questions Presented.

I. Should the "ministerial duty" exception to § 1983 qualified immunity be based upon ambiguous state law or abandoned?

II. Whether a public official is entitled to § 1983 qualified immunity because it was not "clearly established law" in 1981 that linking a civil release to a reinstatement request violated the First Amendment?

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PETITIONER,

v.

RICHARD J. BREAULT,
RESPONDENT.

Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court.

The petitioner, Frank Forastiere, former Chairman of the Board of Fire Commissioners of Springfield, Massachusetts, respectfully prays that a writ of certiorari issue to review the Massachusetts Supreme Judicial Court's denial of § 1983 qualified immunity to him entered in these proceedings on October 13, 1987.

Opinions Below.

The opinion of the Massachusetts Supreme Judicial Court (SJC) is reported at 401 Mass. 26, 513 N.E.2d 1277 (1987) and a copy appears in the appendix hereto, p. 1a, *infra*.

The judgment, memorandum and order entered by the Superior Court Department of the Trial Court of Massachusetts on summary judgment and qualified immunity have not been reported. They are reprinted in the appendix hereto, p. 21a, *infra*.

Jurisdiction.

The SJC's judgment was entered October 13, 1987, and this petition for certiorari was filed within ninety (90) days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statute Involved.

42 U.S.C. § 1983. *Civil action for deprivation of rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . . .

Statement of the Case.

Richard Breault is a firefighter employed by the City of Springfield, Massachusetts (the City). In August, 1977, he was indicted on several criminal charges, including statutory rape. Breault made a written request to the Springfield Board of Fire Commissioners (board) for a leave of absence "for thirty days or until my personal problem has been resolved." His request was granted.

Frank Forastiere by trade is a funeral director. In 1978 he was appointed to the board which is responsible for hiring and firing firefighters. Like all other board members, Forastiere was not compensated for his public service. He served as the board's chairman from July 1978, through November 1984.

In April 1981, Breault was acquitted of the criminal charges. In June he applied for reinstatement as a firefighter. On August 4, 1981, Breault appeared before the board concerning his reinstatement request. Forastiere expressed his "feel(ing) that any claim against the City or the Fire Department should be resolved before (the plaintiff) is considered for reinstatement." Breault "was asked if he would sign a statement that he would not bring any claims against the City or the Fire Department." Breault said "he was not sure, he would have to check with his lawyer." Forastiere "said it was difficult to make a decision and they would wait to see what the Law Department comes up with." Because the board wanted "an answer to their question about any claims against the City or the Fire Department," the matter was postponed. After Breault's counsel wrote the board inquiring about the status of the reinstatement request, the board met and reinstated Breault effective November 23, 1981.

In December 1982, Breault filed suit against the City and Forastiere alleging, *inter alia*, a denial of Constitutional rights pursuant to 42 U.S.C. § 1983. The trial court granted the City

summary judgment. Forastiere moved for a pretrial determination of qualified immunity from suit "because no case clearly established in 1981 that requesting a settlement on a claim of back wages, prior to reinstatement to employment, violated an employee's right to petition the government under the first amendment to the United States Constitution." (Motion, A. 19a-20a). The trial judge conceded "some doubt as to how the distinction between a discretionary function and a ministerial function should be applied" because of footnote 14 in *Davis* v. *Scherer*. The trial judge denied qualified immunity because Forastiere under state law was not "performing a discretionary function in acting on the plaintiff's request for reinstatement" and "the right of free access to the courts is . . . so clearly established that a reasonable person . . . would have known about it" (Memorandum, A. 25a & n.1). This ruling was appealed to the Massachusetts Appeals Court from which the SJC took the case on its own motion.

A divided SJC affirmed the order denying qualified immunity in pertinent part, saying:

> [I]mmunity is available, as a threshold matter under *Harlow*, only where the defendant official was "performing discretionary functions," *Harlow, supra*[, 457 U.S. 800 (1982)] at 818. We agree with the judge that the facts alleged by the plaintiff described circumstances in which the defendant was called upon to act only in a ministerial, not a discretionary, capacity. . . . Because the defendant enjoyed no statutory discretionary authority to withhold reinstatement, he acted in a ministerial capacity. Immunity was properly denied.

(App. 8a-9a; 401 Mass. at 33-34.) (Footnotes and citations omitted.) The dissent states:

> The . . . defendant cannot be charged with responsibility for failure to perform a ministerial act until such time as it is shown that the conditions making reinstatement mandatory have been clearly established. Therefore, because . . . the official could not know the precise action that was required of him, . . . reinstatement was discretionary. . . .
> [T]he plaintiff has failed to allege sufficient facts either in his complaint or by affidavit to establish the defendant's liability under 42 U.S.C. § 1983.

(App. 15a-16a; 401 Mass. at 40-41.) (Footnotes and citations omitted.)

Reasons for Granting the Writ.

I. The Decision Below Raises Significant Problems Likely to Recur Involving the Proper Construction of the "Ministerial Duty" Exception to § 1983 Qualified Immunity.

The SJC denied § 1983 qualified immunity "as a threshold matter" without reaching whether the First Amendment right at issue was clearly established when Forastiere acted. The SJC, by construing state law (M.G.L. c. 31, § 37), held that Forastiere "enjoyed no statutory discretionary authority" and "acted in a ministerial capacity". (App. 9a; 401 Mass. at 34.)

This state law construction of the "ministerial duty" exception to § 1983 qualified immunity poses significant problems for state courts, lower federal courts and public officials throughout the country. First, § 1983 qualified immunity will not be objectively predictable, impairing the ability of executive officers

to make decisions in the public interest without fear of liability. Second, state courts, lower federal courts and public officials will waste scarce resources defending insubstantial § 1983 claims which should be disposed of without resort to trial. Third, arcane common law principles involving ministerial and discretionary functions introduce complexity and confusion into federal qualified immunity analysis. Fourth, common law ministerial and discretionary functions will vary from state to state and thus federal immunity will not be uniform. Finally, this Court's docket will expand to deal with § 1983 qualified immunity appeals from the fifty states unless state courts are given direction on how to construe the "ministerial duty" exception to § 1983 qualified immunity.

This case provides an opportunity to clear up confusion over the "ministerial duty" exception to § 1983 qualified immunity and stop error in its tracks by requiring application of the federal standard enunciated in *Davis*:

> [B]reach of a legal duty created by [state law] would forfeit official immunity only if that breach itself gave rise to the . . . cause of action for damages. . . . A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused.

Davis v. *Scherer*, 468 U.S. 183, 197 n.14 (1984) (citation omitted). The SJC's construction of state law in 1987 did not assist Forastiere who acted in 1981. Massachusetts General Law c. 31, § 37 had not been construed to apply to an indefinite leave of absence in August of 1981. Furthermore, in August 1981, it was not clearly established law that linking a reinstatement request to a civil release violated the First Amendment.

"[H]indsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 (1985).

The SJC's state law construction of the "ministerial duty" exception permits an insubstantial § 1983 claim to go to trial. This undermines "application of the qualified immunity standard" which "public policy at least mandates." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813 (1982). The SJC's focus on state statute rather than the federal standard in *Davis* is infectious error which, if uncorrected, will plague both federal and state courts with unnecessary hair-splitting immunity litigation.

The Court should cut the Gordian knot of common law tort principles and abandon the "ministerial duty" exception to § 1983 qualified immunity.

> [This Court] never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law. . . .

Anderson v. *Creighton*, U.S. , 97 L.Ed.2d 523, 534, 107 S.Ct. 3034, 3041 (1987).

The Seventh Circuit, on public policy grounds, considers it "unwise to engage in a case by case determination of Section 1983 immunity based upon the ministerial versus discretionary nature of the particular official act challenged." *Coleman* v. *Frantz*, 754 F.2d 719, 727 (7th Cir. 1985). The Fifth Circuit "in a suit over the deprivation of a constitutional right" notes "allegations about the breach of a statute . . . are simply irrelevant to the question of an official's eligibility for qualified

immunity." *Gagne* v. *Galveston*, 805 F.2d 558, 560 (5th Cir. 1986).

The ministerial-discretionary dichotomy should be abandoned because it "is not . . . a distinction that judicial, academic or practicing lawyers have been able to define." Prosser and Keeton on Torts § 132, at 1062 (5th ed. 1984).

Public policy and judicial economy require that the "ministerial duty" exception to § 1983 qualified immunity be based upon the federal (i.e. *Davis*) standard or abandoned.

II. The Decision Below Conflicts with Decisions of This Court and Federal Courts of Appeals.

A. *Conflicts with This Court.*

"A plaintiff . . . may overcome . . . qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." *Davis, supra*, 468 U.S. at 197. In this case, the SJC held they "need not reach" arguments over whether the federal right was " 'clearly established' for *Harlow* purposes" (A. 7a; 401 Mass. at 32). *Anderson* reaffirmed that in resolving qualified immunity, courts must consider the objective question "whether a reasonable" official "could have believed" the actions at issue "to be lawful, in light of clearly established law and the information" the defending public official possessed. *Id.*, 97 L.Ed.2d at 532, 107 S.Ct. at 3040. The SJC failed to consider this objective question and erroneously denied Forastiere qualified immunity.

Forastiere's request for civil release in August 1981 was not a violation of "clearly established" law. "Until recently, judges and other officials with expert knowledge frequently sought waivers of civil claims as a precondition to favorable action toward a criminal defendant." (A. 16a; 401 Mass. at 41 (dissent)). See *Newton* v. *Rumery*, U.S. , 94 L.Ed.2d 405, 107 S.Ct. 1187 (1987); *Foley* v. *Lowell Division of the Dist. Court Dept.*

of the Trial Court, 398 Mass. 800, 801, 805, 501 N.E.2d 1151 (1986) (state judge on March 2, 1983 conditioned favorable action on civil release); and *McCoy* v. *Goldin*, 598 F.Supp. 310, 314-315 (S.D.N.Y. 1984) (attorney who "originated the idea of requiring recoupment and waiver of all rights to litigate" in an April 1982 proposal granted qualified immunity).

B. *Conflicts with Federal Circuits.*

The SJC's decision also conflicts with decisions in the Federal Circuits as to the "ministerial duty" exception to § 1983 qualified immunity.

A divided Seventh Circuit in a wrongful detention case held a sheriff was entitled to § 1983 qualified immunity, in relevant part, stating:

> Plaintiff asserts that the qualified immunity is only available to public officials when their acts are "discretionary". . . . Plaintiff appears to argue that the basis for the public officials' qualified immunity is the common law ministerial-discretionary distinction. But there is no evidence provided by the plaintiff or discovered by us indicating that the ministerial-discretionary distinction is the common law foundation for Section 1983 immunity. Further, the Supreme Court has cast doubt upon the relevance of this common law doctrine to Section 1983 immunity considerations and upon the wisdom of utilizing the distinction as a basis for determining the existence of an immunity from Section 1983 liability.
>
> This Court . . . considers . . . it . . . unwise to engage in a case by case determination of Section 1983 immunity based upon the ministerial versus discretionary nature of the . . . act challenged. Not

> only would such an analysis require repeated judicial applications of the unclear ministerial-discretionary distinction, but more importantly it would do little to forward the purpose of the immunity. . . . The use of a ministerial-discretionary distinction by courts would provide these officials with little or no guidance as to the protection afforded them. . . .

Coleman v. *Frantz*, 754 F.2d 719, 727-728 (7th Cir. 1985) (citations and footnotes omitted). Cf. *Thorne* v. *El Segundo*, 802 F.2d 1131, 1138 n.7 (9th Cir. 1986).

A divided Fifth Circuit in a jail suicide case held a police officer was entitled to the defense of § 1983 qualified immunity, in relevant part, stating:

> The plaintiffs argue that Putnal is not entitled to qualified immunity because he was not engaged in a "discretionary act." To support this argument, they contend that there was an unambiguous police department regulation. . . .
> [A]llegations about the breach of a statute or regulation are simply irrelevant to the question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right. This question must be answered solely by an inquiry into whether the constitutional right at issue was clearly established at the time of the events in question.

Gagne v. *Galveston*, 805 F.2d 558, 559-560 (5th Cir. 1986) (citations omitted).

The conflicts cited justify the grant of certiorari to review the SJC's judgment. Alternatively, these conflicts justify grant of certiorari, vacation of the judgment and remand to the SJC

for consideration of the objective question of whether the federal cause of action states a violation of "clearly established" law.

Conclusion.

In a suit alleging constitutional deprivations, a public official's right to § 1983 qualified immunity should not depend upon judicial construction of state law. Federal § 1983 qualified immunity should be determined under federal law applied consistently nationwide. Public officials need to know what is going on. Immunity should be objectively predictable.

For these reasons, a writ of certiorari should issue to review the denial of § 1983 qualified immunity to Frank Forastiere by the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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January 7, 1988

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RICHARD J. BREAULT *vs.* CHAIRMAN OF THE BOARD OF FIRE COMMISSIONERS OF SPRINGFIELD.[1]

No. 4340.

Hampden. March 4, 1987. — October 13, 1987.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH, & O'CONNOR, JJ.

Practice, Civil, Interlocutory appeal. *Civil Rights,* Immunity of public official. *Municipal Corporations,* Officers and agents. *Public Officers. Statute,* Construction.

A judge's pretrial ruling that, even though certain acts complained of by the plaintiff were performed by the defendant solely in his capacity as a public official, he was not immune from liability under the State or Federal civil rights laws, G. L. c. 12, §§ 11H and 11I, and 42 U.S.C. § 1983 (1982), was final for purposes of appeal. [30-31]

The chairman of a city's board of fire commissioners was called upon to act only in a ministerial, not a discretionary, capacity when responding to a firefighter's request for reinstatement under G. L. c. 31, § 37, following a voluntary leave of absence, and consequently, the chairman was not immune from suit by the firefighter under 42 U.S.C. § 1983 (1982), for allegedly violating his civil rights by conditioning his reinstatement on his agreeing not to bring any claims against the city or its fire department. [31-34] LYNCH, J., joined by NOLAN, J., dissenting.

The chairman of a city's board of fire commissioners, in reinstating a firefighter pursuant to G. L. c. 31, § 37, following a voluntary leave of absence, was performing an intentional ministerial act in his capacity as a public official, and thus was not immune from a suit by the firefighter alleging that, by conditioning the reinstatement upon the firefighter's agreeing to bring no claims against the city or its fire department, the chairman had violated the Massachusetts Civil Rights Act, G. L. c. 12, §§ 11H and 11I. [34-38] WILKINS, J., concurring. LYNCH, J., joined by NOLAN, J., dissenting.

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[1] The chairman, Frank Forastiere, was also sued individually. The city of Springfield was also a defendant but was granted a motion for summary judgment.

An amicus brief was submitted by the Civil Liberties Union of Massachusetts and the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association.

CIVIL ACTION commenced in the Superior Court Department on December 30, 1982.

A pretrial motion for a determination of the defendant's qualified immunity from suit and a motion for summary judgment were heard by *John F. Moriarty*, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Harry P. Carroll, Deputy City Solicitor (*Richard T. Egan*, City Solicitor, with him) for the defendant.

Arthur D. Serota for the plaintiff.

Marjorie Heins & Robert Sherman, for Civil Liberties Union of Massachusetts & another, amici curiae, submitted a brief.

LIACOS, J. A judge of the Superior Court concluded, in a pretrial order, that, even though the acts complained of by the plaintiff were performed by the defendant solely in his capacity as a public official, he is not immune from liability under the Federal or State civil rights laws, 42 U.S.C. § 1983 (1982) and G.L. c. 12, §§ 11H and 11I (1986 ed.).[2] The judge also

[2] In relevant part, the statutes centrally pertinent to this appeal read as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1982).

"Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured." G. L. c. 12, § 11H (1986 ed.).

"Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the

denied the defendant's motion for summary judgment. The defendant appeals. We conclude that the judge did not err either as to the Federal or State civil rights claim in denying immunity to the defendant. Accordingly, we affirm.

The facts are these. By trade, the defendant is a funeral director. In 1978, the mayor of the city of Springfield (city) appointed him to serve, without compensation, as a member of the board of fire commissioners of Springfield (board), a body charged inter alia with hiring and firing firefighters in conformance with the civil service laws. See G. L. c. 31, §§ 1 (definition of "[a]ppointing authority"), 48 and 51 (1986 ed.). From July, 1978, through November, 1984, the defendant served as chairman. The plaintiff was employed as a firefighter by the city. At times relevant to this case, he held a tenured position which was subject to the provisions of G. L. c. 31. In August, 1977, he was indicted on several criminal charges, including statutory rape. The plaintiff was advised by the chief of the fire department that he was at risk of permanent termination from employment if found guilty of conduct unbecoming a firefighter, but that he could request an unpaid leave of absence pending resolution of the charges against him. The plaintiff then made written request for a leave of absence "for thirty days or until my personal problem has been resolved." His request was granted.

In April, 1981, the plaintiff was tried and acquitted of the criminal charges against him. In June, he applied to the board for reinstatement as a firefighter. Told to appear at a monthly meeting of the board on August 4, 1981, he did so. The minutes of that meeting disclose that "[t]he Chairman asked [the plaintiff] if he had any claims against the Fire Department or the City," and whether "he had considered writing to the Commission that does not [*sic*] hold the City harmless." The chairman expressed his "feel[ing] that any claim against the City or

litigation and reasonable attorneys' fees in an amount to be fixed by the court." G. L. c. 12, § 11I (1986 ed.).

Qualified immunity may be available to public officials under § 1983. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

the Fire Department should be resolved before [the plaintiff] is considered for reinstatement." Although another commissioner suggested that the commission "does not want to make it sound like reinstatement . . . is contingent upon whether or not any action is taken by him against the City . . . Breault was asked if he would sign a statement that he would not bring any claims against the City or the Fire Department." When the plaintiff said "he was not sure, he would have to check with his lawyer . . . [t]he Chairman said it was difficult to make a decision and they would wait to see what the Law Department comes up with." Because "[t]he Commission want[ed] an answer to their question about any claims against the City or the Fire Department," the matter was postponed until the next meeting. After more than two months had elapsed, plaintiff's counsel wrote to the board on October 21, 1981, indicating that the plaintiff was represented by counsel and inquiring about the status of Breault's request for reinstatement. On November 10, 1981, the board met and decided to reinstate the plaintiff, his reinstatement to take effect on November 23, 1981.

The plaintiff filed suit against the city and the chairman in December, 1982. In its first three counts, the complaint sought compensation for wrongs alleged to have resulted from his unpaid leave of absence.[3] Count IV alleged denial of the plaintiff's rights and privileges under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and demanded compensation pursuant to 42 U.S.C. § 1983. Concerning rights similarly grounded, count V alleged deprivation of those rights "by force, threats, coercion, and intimidation" and demanded compensation pursuant to G. L. c. 12, §§ 11H and 11I. In response to a series of motions in 1985, the judge allowed summary judgment for the defendant city on all counts

[3]Count I alleged breach of the plaintiff's employment contract and demanded compensation for lost wages and benefits; count II alleged tortious interference with contractual relations and demanded similar compensation, plus an award for emotional distress; count III alleged tortious interference with the plaintiff's right to employment, as guaranteed by G. L. c. 31 (1986 ed.), the civil service statute.

of the complaint and for the defendant on count I. The defendant was denied summary judgment on the remaining counts.[4] On March 11, 1986, the judge denied the defendant's motions for reconsideration of summary judgment; and, in answer to the defendant's motion for a pretrial determination of qualified immunity from suit on counts IV and V, the judge ruled that the defendant is not immune from liability. The defendant filed a notice of appeal from the order denying immunity from liability on counts IV and V.[5]

1. *Qualified immunity pursuant to § 1983.* The defendant argues that qualified immunity was denied erroneously, and that this interlocutory appeal is properly before us. The plaintiff maintains the contrary.

a. *Appropriateness of review.* The judge's order did not conclude the plaintiff's action at the trial level, and in that sense it was not the sort of final judgment that is entitled to appellate review. See *Kargman* v. *Superior Court,* 371 Mass. 324, 329-330 (1976), and cases cited. Nonetheless, even where part of an action remains undetermined, we treat an order as final if it is to be executed presently with the result that any later appeal would be futile. *Borman* v. *Borman,* 378 Mass. 775, 779-780 (1979), relying on *Vincent* v. *Plecker,* 319 Mass. 560, 564 n.2 (1946).

[4] We are not asked to decide, nor do we take a position on, the question of the validity or the legal sufficiency of the plaintiff's claims under either the Federal or State Civil Rights Acts. We decide only the limited question whether the defendant is entitled to immunity from suit or liability due to the official capacity in which he performed the acts which give rise to this complaint.

[5] The order appealed from denied immunity not only with respect to the plaintiff's civil rights claims but also with regard to the intentional torts alleged in the surviving counts II and III. This part of the order does not appear to have been appealed.

In addition to the appeal, the defendant petitioned a single justice of the Appeals Court for relief pursuant to G. L. c. 231, § 118 (1986 ed.). On April 18, 1986, the petition was denied, and the defendant's appeal from that denial by a single justice was dismissed on May 28, 1986, leaving only his appeal from the trial judge's denial of summary judgment and the order denying him immunity. A single justice of the Appeals Court concluded that this appeal should be heard by a panel of the Appeals Court. We transferred the case to this court on our own motion.

The defendant would not benefit from our rule of "present execution," as stated in *Borman*, if the asserted right to immunity is but a right to freedom from *liability* under § 1983, for in that case his right could be vindicated fully on appeal after trial. If, however, the asserted right is one of freedom from *suit*, the defendant's right will be lost forever unless that right is determined now, and his appeal is proper.

The controlling Federal authority clearly indicated that the immunity in question is an immunity from "the risks of trial." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). The immunity created by the Supreme Court for application to suits brought under this Federal statute is an immunity from suit, not just from liability. *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985) (plurality opinion, *id.* at 518, 530, stating that, by force of "collateral order doctrine," decision by Federal District Court denying qualified immunity to suit under § 1983 is appealable "final decision" within meaning of 28 U.S.C. § 1291, notwithstanding absence of final judgment).[6] Therefore, in the sense contemplated by our rule of present execution, *Borman*, *supra*, the judge's order denying qualified immunity is final, and the question of the validity of the judge's order is ripe for consideration by this court.

b. *The denial of immunity*. "Government officials performing discretionary functions may be shielded from liability for civil

[6] The plaintiff argues that *Mitchell*, *supra*, is binding authority only where action under § 1983 is brought in the Federal courts, which alone are subject to the Supreme Court's interpretation of 28 U.S.C. § 1291; and that, pursuant to longstanding rules governing choice of law, matters pertaining to form and conduct of an action, including remedies, are procedural questions properly governed by the law of the forum (Massachusetts), which he views as barring the defendant's interlocutory appeal. While the first of the plaintiff's propositions may be strictly correct, we note that the *Mitchell* Court, *supra* at 518, arrived at its result by applying the "collateral order doctrine" of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), and we have described the *Cohen* rule as "a doctrine closely analogous to our rule of present execution." *Borman*, *supra* at 780. Thus, even if we were concerned merely with comity and consistency, we would hold as we do. More importantly, were we to withhold the right of appeal in courts of this Commonwealth, the practical effect would be to ensure that a large number of suits under § 1983 would be removed to Federal courts. We decline to adopt such a rule.

damages in a § 1983 action by the doctrine of qualified immunity. *Harlow* v. *Fitzgerald*, [457 U.S. 800, 818 (1982)]; *Davis* v. *Scherer*, [468 U.S. 183, 194 n.12 (1984)] (immunity standard of *Harlow* applies in § 1983 actions). An official is entitled to immunity if, at the time of the challenged action, the statutory or constitutional right allegedly violated was not 'clearly established.' *Harlow*, 457 U.S. at 818]." *Bonitz* v. *Fair*, 804 F.2d 164, 166 (1st Cir. 1986). Discussing the role of appellate courts pursuant to *Mitchell, supra*, the United States Court of Appeals for the First Circuit, in *Bonitz* v. *Fair, supra*, has emphasized that the scope of review is limited to questions of law, *id.*, quoting *Mitchell, supra* at 530, that is, whether (a) the acts complained of were "discretionary functions," not ministerial in nature, and (b) the statutory or constitutional rights allegedly violated were "clearly established." See *Anderson* v. *Creighton*, 107 S. Ct. 3034, 3040 (1987) (principle of qualified immunity allows defendant to seek summary judgment on ground that, on "clearly established principles [of law]," he could have reasonably believed his acts to be lawful).

In this case, the judge withheld immunity under the *Harlow* standard because he concluded both that (a) when responding to the plaintiff's request for reinstatement, the defendant was performing a nondiscretionary, ministerial act, clearly mandated in the instant circumstance by G. L. c. 31, § 37 (governing reinstatement after voluntary leave of absence from a civil service position); and (b) even though "[t]he average layman may not be able to point immediately to the First Amendment to the United States Constitution or Article XI of the Declaration of Rights as the source" of the right allegedly violated, "the right of free access to the courts is . . . so clearly established that a reasonable person in [the defendant's] position would have known about it." The defendant argues, however, that rights are not "clearly established" for *Harlow* purposes unless, at the time of the acts at issue, the rights were enshrined in factually indistinguishable case law, either controlling in the jurisdiction or substantially uncontroverted, about which a layman like himself reasonably should have known.

We need not reach these latter arguments because immunity is available, as a threshold matter under *Harlow*, only where the defendant official was "performing discretionary functions," *Harlow, supra* at 818. We agree with the judge that the facts alleged by the plaintiff described circumstances in which the defendant was called upon to act only in a ministerial, not a discretionary, capacity.[7] It is undisputed that the leave of absence granted to the plaintiff in 1977 was governed by G. L. c. 31, § 37. According to § 37, "[a]ny person who has been granted a leave of absence . . . pursuant to this section *shall* be reinstated at the end of the period for which the leave was granted . . ." (emphasis supplied). Having in mind both "the ordinary and approved usage" of this language, as well as the "object to be accomplished," *Commonwealth* v. *Galvin*, 388 Mass. 326, 328 (1983), namely the protection of civil servants' rights to their public employment, see generally *Horrigan* v. *Mayor of Pittsfield*, 298 Mass. 492, 495 (1937),

[7] The dissent proceeds on the premise that the defendant's acts were discretionary, not ministerial. Thus, the dissent relies on *Harlow* for its conclusion that the defendant, at least under Federal law, was entitled to immunity. A number of points need be made. First, *Harlow* itself recognizes that the doctrine of qualified immunity is limited to discretionary acts. "Immunity generally is available only to officials performing discretionary functions." *Harlow, supra* at 816. Second, the motion judge ruled that the defendant "was not . . . performing a discretionary function in acting on the plaintiff's request for reinstatement." Third, the plaintiff's complaint and answers to interrogatories assert throughout a violation of G. L. c. 31 and of the collective bargaining agreement between the city and the plaintiff's union. Fourth, G. L. c. 31, § 37, on its face (see text above), is clear that reinstatement was mandatory. Fifth, it is clear that the leave expired when the plaintiff's "personal problem" was resolved, or that the "personal problem" had been resolved (by the jury's verdict of acquittal) by the time the plaintiff sought reinstatement. Last, and perhaps most important, the dissent's position confuses the merits of the claim with the interlocutory matter before us — whether there is immunity from suit — with the substantive question of liability, a point we decline to reach (see note 4 *supra*). If the dissent were to prevail, summary judgment would enter for the defendant, and the plaintiff would be barred from having his claim decided on the merits.

As to the dissent's views on the State Civil Rights Acts, that opinion also is based on the same faulty premises. The dissent's reliance on *Gildea* v. *Ellershaw*, 363 Mass. 800 (1973) is misplaced, since the acts here involved were not discretionary, but ministerial.

we read the statute to require reinstatement when the term of the leave expires. Admittedly, the terminus of the leave granted to the plaintiff was not fixed by date; nonetheless, because the leave was sought by the plaintiff to cover that period of time "until my personal problem [i.e., his indictment] has been resolved," reinstatement was the plaintiff's mandatory right after his acquittal.[8] Because the defendant enjoyed no statutory discretionary authority to withhold reinstatement, he acted in a ministerial capacity. Immunity was properly denied.

2. *Immunity under State law.* In response to the defendant's claim of immunity from liability or suit under the Massachusetts Civil Rights Act (Act), G. L. c. 12, §§ 11H and 11I, the judge reasoned from our decision in *Chicopee Lions Club* v. *District Attorney for the Hampden Dist.*, 396 Mass. 244 (1985), that "some form of immunity is applicable to claims against [nonjuridical] officers . . . in appropriate cases." He then applied to the plaintiff's statutory action our common law standard for extending immunity to nonjuridical officers sued in tort. According to this test, immunity is warranted where an official has acted within the scope of a discretionary public duty and not in bad faith, with malice, or corruptly. See *Gildea* v. *Ellershaw*, 363 Mass. 800, 820 (1973). For purposes of argument, the judge ruled that, even if the defendant had performed in a discretionary capacity, immunity was unwarranted because, if the plaintiff's allegations were true, the defendant could be viewed as having tried to coerce him into surrendering the right to pursue his legal claims, and therefore the defendant could be found to have acted in bad faith or with malice. We concur in the result reached by the judge, but on different grounds.[9]

[8] *Davis* v. *Scherer*, 468 U.S. 183 (1984), is not to the contrary. It states that a law creates discretionary authority for purposes of *Harlow* whenever it "fails to specify the precise action that the official must take in each instance." *Id.* at 196-197 n.14. We read § 37 as mandating reinstatement in *every* instance where, as here, the terminus of the leave is clearly determinable from the terms of its grant.

[9] Again, the plaintiff argues that the judge's order denying immunity is interlocutory and not appealable. However, if immunity is even arguably

In *Chicopee Lions Club, supra* at 252, we noted that "the Massachusetts Civil Rights Act by its terms admits of no immunities." Even though the Act itself is silent on the question of immunity, it is reasonable to conclude that the Legislature did not intend to immunize nonjuridical officers for all ministerial acts performed by them.[10] In the year immediately prior to adoption of the Civil Rights Act, St. 1979, c. 801, the Legislature responded to the proddings of this court by adopting a tort claims act, G. L. c. 258. See St. 1978, c. 512, § 15. The Tort Claims Act abrogated the common law rule of sovereign immunity which had theretofore immunized public entities from suit in tort claims arising from the acts or omissions of public employees. See G. L. c. 258, § 2. See also *Morash & Sons* v. *Commonwealth,* 363 Mass. 612 (1973). The Tort Claims Act also absolved public employees from liability for their negligent acts performed within the scope of official duties. G. L. c. 258, § 2. Significantly, however, the Tort Claims Act withheld immunity from public employees (and retained immunity for public entities) where the acts complained of were "intentional," as opposed to negligent, G. L. c. 258, § 10 (*c*); and the Tort Claims Act authorized public employers to "indemnify public employees . . . in an amount not to exceed one million dollars" where harm is alleged "by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law." G. L. c. 258, § 9.[11]

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in the public interest, it must operate as an immunity from suit, not just from liability. See *Mitchell* v. *Forsyth,* 472 U.S. 511, 525-526 (1985). Consequently, the judge's order was appealable because it was "final" within the meaning of our rule of "present execution." See *Borman* v. *Borman,* 378 Mass. 775, 779-780 (1979).

[10] *Tyree* v. *Keane,* 400 Mass. 1, 5-6 (1987), is not to the contrary. In that case, we assumed qualified immunity to be a defense to a § 1983 action in determining the relevance of certain excluded evidence. In *Tyree* we did not discuss the question of qualified immunity under the State act because the parties did not raise the question.

[11] Indemnification is also provided for certain public officers. G. L. c. 258, § 9A (1986 ed.). In contrast, intentional violations of civil rights are not subject to indemnification. G. L. c. 258, § 13.

Thus, when the Legislature adopted the Civil Rights Act one year later in 1979, it wrote on a common law slate recently wiped clean and newly limited with statutory markings. Clearly, these markings indicated a legislative willingness to see public officers sued for violations of civil rights, else no treatment of the question of indemnification from civil rights suits would have been necessary. Furthermore, while we do not intimate that compensatory civil rights claims are indistinguishable from actions alleging intentionally tortious acts, the Legislature's provision for indemnity from both in the same statutory sections, §§ 9 and 9A, and the exclusion of indemnity in § 13, suggests an awareness by the Legislature of the possibility of suits such as this. Additionally, the statutory exemption only for discretionary acts, G. L. c. 258, § 10 (*b*), buttresses our view that the Legislature did not intend to preclude suits based on intentional ministerial acts.

Because the Civil Rights Act proscribes only those interferences with civil rights which are accomplished "by threats, intimidation or coercion," G. L. c. 12, § 11H, incorporated by reference in G. L. c. 12, § 11I, the Act operates almost entirely within the realm of "intentional" behavior.[12] Given that adoption of the Act followed closely on the heels of enactment of the Tort Claims Act, we think it both logical and likely that the Legislature viewed the later legislation in light of the earlier enactment, and intended to withhold immunity from officials who intentionally violated the Act, just as the Tort Claims Act withholds immunity from intentional tortfeasors.

[12] By this we mean that the Act operates almost entirely within the realm of behavior which is "intentional" in the tort sense "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965). Accord *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99 (1987) (although "specific intent" is not essential to violation of Act, that degree of intent which makes persons responsible for natural consequences of their action must be shown). Also, G. L. c. 258, §§ 9, 9A, 10 (*c*), and 13, recognize the potential distinction between intentional torts and intentional violations of civil rights.

We need not decide the question whether a negligent violation of civil rights may give rise to a valid claim of a violation of the Act.

Turning now to the question whether, at the time the Act was passed, there existed any "tradition" of immunity for nonjuridical officers so firmly "rooted in history" that we should not presume the Legislature to have abandoned it without comment, *Chicopee Lions Club, supra,* our review of the court's common law decisions reveals nothing of the sort. Compare *Anderson* v. *Bishop,* 304 Mass. 396, 398-399 (1939) (directly citing a line of decisions back to 1854 in support of the doctrine of absolute judicial immunity, and back to 1926 in support of absolute prosecutorial immunity), with *Gildea* v. *Ellershaw,* 363 Mass. 800, 820 (1973). In *Gildea,* the court sought to reconcile what can best be described as a confusing welter of previous decisions. Some of these decisions withheld immunity entirely, stating, for example, that, even where nonjuridical officers had performed their duties in good faith, "[t]he cloak of office is no protection to them," *Stiles* v. *Municipal Council of Lowell,* 233 Mass. 174, 182 (1919), discussed in *Gildea, supra* at 805-810, 821-825; *Miller* v. *Horton,* 152 Mass. 540 (1891) (Holmes, J.); other decisions, however, upheld immunity even when the official acts complained of were ministerial in nature, so long as nonfeasance was alleged rather than misfeasance, see, e.g., *Desmarais* v. *Wachusett Regional School Dist.,* 360 Mass. 591, 593 (1971), mentioned in *Gildea, supra* at 812 n.11; and see *Fulgoni* v. *Johnston,* 302 Mass. 421, 423 (1939);[13] and still others "attempt[ed] to give nonjudicial public officers the benefit of . . . [absolute] immunity . . . enjoyed by judges, but only if . . . the function of the officer which gave rise to the claim for damages was either judicial or quasi judicial in nature." *Gildea, supra* at 812, referring to *Barry* v. *Smith,* 191 Mass. 78, 88 (1906), and *Jaffarian* v. *Murphy,* 280 Mass. 402, 406-407 (1932). It was decided in *Gildea* that henceforward the nonjuridical officer was entitled to tort immunity for discretionary acts performed within the scope of official duty, in good faith and without malice or corruption. *Id.* at 820. It is significant to note that both *Gildea* and *Chicopee*

[13] For a recent discussion of the vitality of this approach where negligence is alleged at common law, see *Narine* v. *Powers,* 400 Mass. 343 (1987).

Lions Club dealt with discretionary acts of public officials. The same is true of *Pina* v. *Commonwealth,* 400 Mass. 408, 412 (1987). See G. L. c. 258, § 10 (*b*). None of these cases, or § 10 (*b*), has application to acts, such as those in the case at bar, which are ministerial in nature. In these circumstances, we think that the silence of the Legislature concerning immunity under the Act cannot be interpreted as incorporating a tradition of immunity for intentional ministerial acts. In this context where history is no guide, we rely heavily on the principle that the Act, "like other civil rights statutes, is remedial [and] is entitled to liberal construction of its terms." *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822 (1985). We conclude, therefore, that, where intentional ministerial acts of public officials are involved, there is no basis to conclude, under the relevant statutes and case law, that immunity from suit should be granted. Accordingly, the judge was correct in ruling that the defendant was not immune from the remedial ambit of the Act.

The considerations cited in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), do not outweigh the public interest in affording remedies to persons injured as described in the Act. We need not discuss the defendant's argument in favor of adopting the particular form of immunity propounded in *Harlow* because that case deals with discretionary, not ministerial, acts. While we appreciate the meticulousness with which the judge applied the *Gildea* test for immunity in this case, we decline to adopt that approach. The *Gildea* standard is basically a test which serves to protect officials who perform discretionary duties.

Since no immunity was warranted, the order denying the defendant immunity under counts IV and V was correct, and summary judgment for the defendant was properly denied.

Orders affirmed.

WILKINS, J. (concurring). The court is correct in concluding that the defendant was performing a ministerial act. The court's opinion, however, unduly complicates this case.

The basic issue is whether the defendant is entitled to immunity under G. L. c. 258, § 2. He is so entitled if § 2 applies to his conduct. Section 2 does not apply to "any claim arising out of an intentional tort." G. L. c. 258, § 10 (*c*). Some violations of the Civil Rights Act (G. L. c. 12, §§ 11H and 11I) should be treated as intentional torts for the purposes of § 10 (*c*) and others should not be. The intentional conduct which justifies a claim under the Civil Rights Act is not the same as the intentional conduct that is an element of an intentional tort. See *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99 (1987).

The question whether this claim falls within the scope of G. L. c. 258 remains open in this case. If the claim is based on an intentional tort, such as an intentional violation of civil rights, I agree that the defendant is not immune from liability. If the claim is based on ministerial conduct which was not undertaken with the intention of depriving the plaintiff of his civil rights, the wrong would not be intentional and § 2 immunity would be available.

LYNCH, J. (dissenting, with whom Nolan, J., joins). I dissent because I conclude that the defendant was immune from suit for the acts complained of under both Federal and State law.

1. *Liability under § 1983.* The court concludes that the defendant was properly denied qualified immunity under 42 U.S.C. § 1983 (1982) because the plaintiff's reinstatement was required by G. L. c. 31, § 37, and, therefore, the defendant's conduct was ministerial and not discretionary. Although reinstatement to a classified position after a leave of absence may be ministerial in some circumstances, the record here establishes that reinstatement was discretionary. General Laws c. 31, § 37, provides, in part, that an appointing authority may grant a leave of absence for more than fourteen days only upon the written request of the employee (or other person authorized) which shall include a detailed statement of the reason for the request. Furthermore, no leave of absence for a period of more than three months shall be granted without the prior approval

of the administrator. The section further provides that any person who has been granted a leave of absence or an extension thereof, "pursuant to this section," shall be reinstated "at the end of the period for which the leave was granted."

The leave in this case was granted in 1977, and the plaintiff's request for reinstatement at issue was filed in June, 1981. The motion judge found that there was nothing in the record to indicate that the leave was granted with the prior approval of the administrator as required by § 37. The court informs us that the plaintiff's leave was requested "for thirty days or until [his] personal problem has been resolved." The plaintiff appeared before the board on August 4, 1981, and he was reinstated three and one-half months later on November 23, 1981. Neither in his complaint nor by affidavit did the plaintiff claim that his request for a leave of absence complied with the requirements of § 37. There was no evidence that the prior approval of the administrator, an essential element of § 37, was obtained, and nowhere does it state that the termination of the leave would be at any definite time, only that the leave was for the vague period, "until my personal problem has been resolved." Neither is it clear that the request for a leave "until my personal problem has been resolved" complies with the requirement that the request contain a detailed statement of the reason for the request. I do not mean to imply that either the plaintiff or the defendant is to be criticized for agreeing to a voluntary leave of absence in the circumstances of this case. The point is that the defendant cannot be charged with responsibility for failure to perform a ministerial act until such time as it is shown that the conditions making reinstatement mandatory have been clearly established. Therefore, because the findings and allegations establish that the factual predicates for the applicability of § 37 were missing, the official could not know the precise action that was required of him, and thus reinstatement was discretionary. I would agree that § 37 mandates reinstatement when those factual predicates are clearly before the official in question; however, such is not the case here.

Neither do I believe that the defendant could be found to have acted with knowledge that his conduct violated any

"clearly established" statutory or constitutional right of the defendant. The defendant could not reasonably be expected to know that the plaintiff's reinstatement on the condition of a waiver of his civil claim was unlawful. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Until recently, judges and other officials with expert knowledge frequently sought waivers of civil claims as a precondition to favorable action toward a criminal defendant. See *Foley* v. *Lowell Div. of the Dist. Court Dep't of the Trial Court*, 398 Mass. 800, 804-805 (1986). Recently, the Supreme Court reversed a decision of the Court of Appeals for the First Circuit, invalidating such a waiver. *Newton* v. *Rumery*, 107 S. Ct. 1187 (1987). Thus the law was by no means settled and, in fact, the Supreme Court in *Newton* v. *Rumery, supra*, ruled that even in a criminal case, such a waiver is not necessarily invalid.

I conclude, therefore, that the plaintiff has failed to allege sufficient facts either in his complaint or by affidavit to establish the defendant's liability under 42 U.S.C. § 1983. Summary judgment in favor of the defendant should have been granted.

2. *Liability under State law*. The court concludes that no immunity protects public officials from liability for intentional torts while performing ministerial acts. Since I believe that the plaintiff's claim is grounded on discretionary conduct of the defendant, I would not reach the question of liability for ministerial acts and would apply our traditional rule of immunity for public officials. Although the Massachusetts Civil Rights Act is silent on the question of immunity, the court recently concluded that juridical officers are absolutely immune from suit under G. L. c. 12, § 11I, because that statute contained no abrogation of the common law immunity of such officers. *Chicopee Lions Club* v. *District Attorney for the Hampden Dist.*, 396 Mass. 244, 252 (1985). I would adhere to the logic of the *Chicopee Lions Club* decision and would apply the rule of immunity in effect prior to the enactment of G. L. c. 12, § 11I.[1] In addition, I cannot agree that the adoption of the

[1] Similar immunity is afforded to such officials under 42 U.S.C. § 1983, the Federal counterpart of G. L. c. 12, § 11I. See *Bell* v. *Mazza*, 394 Mass.

Massachusetts Tort Claims Act in a previous legislative session is any evidence of a legislative intent to create by implication in a subsequent statute a new rule of immunity for previously protected public officials. Furthermore, the fact that the Legislature abolished sovereign immunity in order to permit citizens to seek recourse against governmental agencies evinces no intent to change the law of immunity for public officials who had previously been liable for their negligent, as well as intentional, torts. The Massachusetts Tort Claims Act is not about *granting* immunity to individuals. It created a cause of action against governmental agencies where previously sovereign immunity had barred such suits. It eliminated claims against public employees for negligence within the scope of their employment where liability of governmental agencies was created, G. L. c. 258, § 2, and left undisturbed employee liability where the law of governmental liability was left undisturbed, G. L. c. 258, § 10. Clearly the statute deals primarily with governmental liability and deals only incidentally, in a limited circumstance, with immunity of individuals. In enacting the Massachusetts Civil Rights Act, therefore, the Legislature was adding new principles to a system already affected by common law axioms (as it usually does), not adopting a law to be applied in a vacuum or writing "on a common law slate recently wiped clean." *Ante* at 36.

The common law, as discerned by this court in *Gildea* v. *Ellershaw*, 363 Mass. 800, 820 (1973), is that nonjuridical officers are afforded immunity for their discretionary acts performed within the scope of official duty in good faith without malice or corruption. I would apply to these officers the same immunity that existed for them at the adoption of the Massa-

176, 181 (1985), citing *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819 (1985). The Supreme Court in *Davis* v. *Scherer*, 468 U.S. 183, 194 & n.12 (1984), applied the qualified immunity described in *Harlow* v. *Fitzgerald*, *supra*, to actions brought under 42 U.S.C. § 1983.

chusetts Civil Rights Act as the court has done for juridical officers. I have previously stated that on the facts of this case the defendant's acts were discretionary. I view the allegations as insufficient to warrant the conclusion that he acted in bad faith with malice or corruption.

I reach this conclusion in full view of the policy considerations extant. In the words of the United States Supreme Court, "government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow* v. *Fitzgerald, supra* at 806. "The privilege [of immunity] is not a badge or emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government." *Gildea* v. *Ellershaw,* 363 Mass. 800, 817 (1973), quoting *Barr* v. *Matteo,* 360 U.S. 564, 574 (1959). "[T]he immunity applies equally to decisions which the public officer is required to make [as] to those he is permitted to make." *Id.* In an era where litigiousness among our citizens has reached a fever peak, and where public officials are subjected to scrutiny of their public and private affairs unparalleled in history, I see no justification to depart from a clearly established rule of immunity.

Appendix B

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT CIVIL ACTION NO. 82-1824
RICHARD BREAULT, Plaintiff vs FRANK FORASTIERE, et al Defendants	MOTION FOR DETERMINATION OF QUALIFIED IMMUNITY AS A PRELIMINARY MATTER BEFORE TRIAL

Now comes the defendant Frank Forastiere and moves that the Court determine the issue of qualified immunity, for the purpose of the Civil Rights Claims in counts IV and V of the complaint, as a preliminary matter before trial. As authority for this the defendant cites *Harlow v. Fitzgerald,* 457, U.S. 800, 819 (1982) which states that the matter should be determined before discovery, and that discovery should not be allowed before this determination is made. The Supreme Court affirmed this position in *Mitchell v. Forsyth* 472, U.S. , 86 Led2d 411, 105 S.Ct. (1985) @ Led2d 425.

The Court should find the defendant Forastiere immune from suit because no case clearly established in 1981 that requesting a settlement on a claim of back wages, prior to reinstatement

to employment, violated an employee's right to petition the government under the first amendment to the United States Constitution.

The Supreme Court stated in *Mitchell v. Forsyth,* supra, that: "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted. Hence, in the absence of contrary directions from Congress, Mitchell is immune from suit for his authorization for the Davidon wiretap notwithstanding that his actions violated the Fourth Amendment."

In this case the decisive fact is not whether Forastiere's alleged position was correct, but whether he had any fair warning in 1981 from legal precedent that his alleged position was incorrect. If the law on the topic was not clearly established in 1981 then he had no way of knowing that his alleged position was incorrect, and is immune. The fact that a skilled judge can find an analogous case, that counsel on both sides had overlooked, does not impose liability on a layman who does not either find the case or make the analogy.

THE DEFENDANT,
FORASTIERE

By, /s/Richard T. Egan
Richard T. Egan,
City Solicitor

By, /s/Harry P. Carroll
Harry P. Carroll,
Deputy City Solicitor

Law Department
City of Springfield
36 Court Street
Springfield, Mass. 01103
(413) 787-6085

Appendix C

Commonwealth of Massachusetts

HAMPDEN, ss

Office of the Clerk/Magistrate
Springfield,

Dear Sir:

In the case of No. 82-1824-RICHARD J. BREAULT VS. FRANK FORASTIERE, CHAIRMAN OF THE SPRINGFIELD BOARD OF FIRE COMMISSIONERS, ET AL

March 11, 1986- Endorsement on Motion of deft., Frank Forastiere, Ind. for determination of qualified immunity as a preliminary matter before trial — ORDERED by the court that deft., Forastiere, is NOT immune from liability (see Memorandum and Order entered this date) (Moriarty, J.)

March 11, 1986- Endorsement on Motion of deft., Frank Forastiere, Ind. for reconsideration of denial of summary judgment and to enter summary judgment for him — DENIED by the court (see Memorandum and Order entered this date) (Moriarty, J.)

/s/ William J. Martin Jr.
CLERK/MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss

Superior Court
No. 82-1824

RICHARD BREAULT, Plaintiff

vs.

MEMORANDUM AND ORDER

FRANK FORASTIERE, et al
Defendants

This is a civil action which originally was brought in five counts against two defendants, the City of Springfield and Frank Forastiere in his official capacity as Chairman of the Springfield Board of Fire Commissioners. On September 30, 1985, for reasons set forth in a Memorandum and Order filed that date, I entered a summary judgment for the defendant City of Springfield on all counts and for the defendant Forastiere on Count I of the plaintiff's complaint. I denied, however, Forastiere's motion for summary judgment on Counts II, III, IV and V of the complaint so the case remained open on those counts.

On November 11, 1985 another justice of this court allowed Forastiere to amend his answer by pleading three additional defenses: (i) that Forastiere's actions were privileged as within the scope of his duties as a Springfield Fire Commissioner; (ii) that the plaintiff has an adequate state remedy and that his claim under the federal civil rights statute is therefore barred; and (iii) that Forastiere is immune from liability for the plaintiff's claim. On the same date he allowed the plaintiff to amend his complaint to indicate that Forastiere is being sued in his individual as well as in his official capacity.

The case is now again before me on Forastiere's motions for a Determination of Qualified Immunity as a Preliminary Matter

Before Trial and for Reconsideration of his Motion for Summary Judgment.

The facts are set forth at some length in the Memorandum and Order that I entered on September 30, 1985. To place the present issues in perspective, however, a condensed statement of the relevant facts may be helpful.

The plaintiff was a fireman in the employ of the City of Springfield when he was indicted on several charges, including statutory rape. He requested and was granted a leave of absence from his duties as a fireman while the indictments were pending. Over three years went by before the indictments were brought to trial, but when they were he was acquitted of all charges. At some time in June 1981 (after his acquittal in April of that year) he applied to the Fire Commission for reinstatement to his position. He was not reinstated until November 23, 1981. At a meeting of the Fire Commission (of which Forastiere was chairman) held on August 4, 1981, Forastiere stated that any claims the plaintiff intended to make against the City or the fire department should be resolved before he was considered for reinstatement.

Two of the counts of the complaint that remain pending against Forastiere (Counts II and III) charge him with malicious interference with the plaintiff's contractual relationship with the City. Count IV charges him with a violation of the federal civil statute (42 U.S.C. § 1983) and Count V with a violation of G.L. c. 12, § 11I, the Massachusetts civil rights statute.

In denying Forastiere's motion for summary judgment, I ruled that if Forastiere had intentionally held up the plaintiff's reinstatement for the purpose of coercing him to release the City (and perhaps the Commission) from any claims he might have had against them, that would constitute malicious interference within the meaning of the law. I also ruled that such an action would also constitute an interference with the plaintiff's right to petition the government for a redress of grievances as guaranteed by the First Amendment of the Constitution of

the United States. Whether Forastiere had done so, however, was a question of fact which precluded the entry of summary judgment. What remains, therefore, are the relatively narrow issues relating to the delay in the plaintiff's reinstatement and the relief, if any, to which he is entitled as a result of that delay.

I. Motion for Determination of Qualified Immunity
(a) Section 1983 Immunity

In *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2nd 396 (1982), the Supreme Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established or constitutional rights of which a reasonable person would have known. This is a "qualified immunity" and the standard is an objective one. Because it is an *immunity from suit* rather than a mere defense to liability, it would be effectively lost if a case in which the defendant was immune were erroneously permitted to go to trial. For that reason a person claiming the immunity is entitled to a ruling on that issue at the outset of the litigation, and if the issue is decided against him, to an immediate interlocutory appeal. *Mitchell* v. *Forsyth,* U.S. , 105 S.Ct. 2806 (1985). Therefore, since the issue has now been raised in this case, Forastiere is entitled to an immediate determination of that issue.

The plaintiff claims that Forastiere delayed his reinstatement for an unreasonable period of time in order to coerce him into abandoning any claim for damages which he might have had against the City or the Fire Commission. If that claim is substantiated, Forastiere would be guilty of both a violation of a state statute (G.L.c. 31, § 37 [4th para.]) which requires that a civil service employee who has been granted a leave of absence be reinstated at the end of the period for which the leave was granted, and a violation of the plaintiff's First Amendment right to petition the government for a redress of grievances. He would also be guilty, incidentally, of a violation

of the plaintiff's "right of recourse to the laws for all injuries or wrongs" which is guaranteed by Article XI of the Massachusetts Declaration of Rights.

Forastiere was not, in my judgment, performing a discretionary function in acting on the plaintiff's request for reinstatement. The wording of the statute (G.L.c. 31, § 37) appears to be mandatory and to admit of no discretion. His actions may therefore be outside the scope of his qualified immunity under the federal standard for that reason alone.[1] (See Part II (c) *infra*).

More important, however, the right of the access to the courts is, in my opinion, so clearly established that a reasonable person in Forastiere's position would have known about it. It is a right, as pointed out above, that is enshrined in both our federal and state constitutions, and a right, in this increasingly litigious age, which is being constantly exercised by larger and larger numbers of our population. The average layman may not be able to point immediately to the First Amendment of the United States Constitution or to Article XI of the Declaration of Rights as the source of that right[2], but if faced with the question would surely surmise that the right not only exists but enjoys constitutional protection. That is all that is required for purposes of the objective "good faith" test prescribed by the Supreme Court.

It follows that Forastiere would not be immune from liability under § 1983 if he caused plaintiff's reinstatement to be delayed as a means of coercing him to forego a claim for damages against either the City or the Commission.

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[1] With regard to this point the defendant points to footnote 14 to the opinion of the Supreme Court of the United States in *Davis* v. *Sherer*, U.S. , 104 S.Ct. 3012 (1984). That footnote, I must concede, creates some doubt as to how the distinction between a discretionary function and a ministerial function should be applied. In the second paragraph of the footnote, however, the Court sidestepped any further articulation of the distinction by stating that the regulations in that case left a substantial measure of discretion to the appellants.

[2] Indeed, as the defendant points out in his brief in support of reconsideration of summary judgment, there is at least some basis for an argument that the source of the right is the due process clause of the Fifth Amendment.

(b) State Law Immunity

The common law of this Commonwealth grants a somewhat broader immunity to public officers acting within the scope of their duty, authority and jurisdiction than does the federal law. It is still, however, a qualified immunity rather than an absolute immunity. It was described as follows in *Gildea* v. *Ellershaw*, 363 Mass. 800, 298 N.E.2d 847, 858 (1973):

> . . . if a public officer other than a judicial officer[3] is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby . . . [but] . . . this rule is presently limited to public officers acting in good faith, without malice and without corruption.

That rule was only applicable at common law to public officers performing discretionary functions. It was not applicable to public officers performing ministerial functions as distinguished from discretionary functions. Public officers performing ministerial acts, however, were liable only for misfeasance, that is, for overt and actively tortious conduct, and not for mere nonfeasance at common law. *O'Neill* v. *Mencher*, 21 Mass. App. Ct. 610, 613-614 (1986).

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[3] As Mr. Justice Quirico made clear in footnote 13, the "public officers" referred to here do not include judicial officers who enjoy an absolute immunity.

Under the Massachusetts Tort Claims Act (G.L.c. 358) which became effective in 1978, public employees while performing nondiscretionary functions or duties are immune from liability for all but intentional torts committed within the scope of their office or employment. G.L.c. 258, §§ 2 and 10(c). Section 10(c) specifically exempts from immunity claims for intentional torts in general and for interference with advantageous or contractual relations in particular. The statutory immunity also does not apply to claims based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty (G.L.c. 258, § 10[b]), so presumably the common law rule is still the test where discretionary functions or duties are involved.

In this case, as pointed out above, the functions that Forastiere was called upon to perform was a ministerial and not a discretionary one. The plaintiff's claim is of an intentional tort, so if the plaintiff can establish the facts on which he bases that claim, the statutory immunity will not apply.

However, even if (as the defendant now argues) Forastiere were performing a discretionary function in acting upon the plaintiff's request for reinstatement, he would still not be immune from liability if he were motivated by a desire to coerce the plaintiff into foregoing his civil claim in denying that request. The common law immunity of public officers is a qualified one and is not applicable if the action of the public officer complained of was taken in bad faith, with malice or corruptly. *Ramos* v. *Board of Selectmen of Nantucket,* 16 Mass. App. Ct. 308, 450 N.E.2d 1125, 1129 (1983). "Bad faith" has been said to be "a general and somewhat indefinite term." *Spiegel* v. *Beacon Participations, Inc.*, 297 Mass. 398, 416-417, 8 N.E.2d 895 (1937). In the *Spiegel* Case the court went on to say:

> It has no consticted [*sic*] meaning. It cannot be defined with exactness. It is not simply bad judgment.

> It is not merely negligence. It imports *a dishonest purpose* or *some moral obliquity*. It implies *conscious doing of wrong*. it means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud.

The *Spiegel* definition of bad faith was applied by the Appeals Court to a claim of a public officer to immunity under *Gildea* v. *Ellershaw* in *Ramos* v. *Board of Selectmen of Nantucket, supra*. In that case there was evidence that one of the defendants, the town's superintendent of public works, on one occasion had threatened the plaintiff, a road contractor, with loss of work if he did not obtain bands for an annual children's party organized by the town in an effort to reduce Halloween vandalism, and on another occasion had similarly threatened him if he did not subcontract some work on a bicycle path to a man named Lamb and authorize direct payments to Lamb. With regard to the latter incident, the jury conceivably could have found (the Appeals Court said) that the superintendent used undue pressure (because of his interest in straightening out an awkward controversy embarrassing him with the selectmen) to persuade the plaintiff to yield to Lamb some work which the plaintiff was contractually entitled to perform. The court held that that was sufficient to allow the case to go to the jury on whether the testimony, if believed, showed corrupt or malicious acts or acts "not in good faith."

In my opinion, if Forastiere, the defendant in this case, exerted economic pressure upon the plaintiff by holding up his reinstatement in order to persuade him that he should abandon or forego any claim for civil damages he might have had against the City or the fire commission, that action was sufficiently malevolent to constitute bad faith. It was not simply bad judgment or mere negligence. If it occurred, it was an intentional abuse of power, probably intended to spare the fire

commission the public embarrassment that might ensue if the plaintiff were to prevail in a civil action for over three years of back pay. It could be found to be motivated by self-interest on the part of Forastiere and hence to be the type of overstepping which results in loss of a public officer's common law immunity under the *Gildea* v. *Ellershaw* test.

Furthermore, even if it should be held that bad faith alone is not enough to overcome the immunity and that actual malice in the sense of hatred, anger, spite or ill will must be shown, it must be remembered that malice may be shown by the proof of facts from which an inference of malice may be drawn. *Gram* v. *Liberty Mutual Insurance Company,* 384 Mass. 659, 429 N.E.2d 21, 24 (1981). The fact that there is no direct evidence that Forastiere acted with actual malice toward the plaintiff is therefore not dispositive. It could easily be inferred from his actions and his statement that he was resentful of the suggestion that the plaintiff contemplated a civil action against the City or against the commission of which he was the chairman, and that the delay in the plaintiff's reinstatement was due in some substantial measure to that resentment.

It follows that Forastiere's claim of immunity on the malicious intereference counts must be denied.

(c) G.L.c. 12, § 11 I Immunity

In *Chicopee Lions Club* v. *District Attorney,* 396 Mass. 244, 485 N.E.2d 673, 678 (1985), the Supreme Judicial Court pointed out that the Massachusetts Civil Rights Act (G.L.c. 12, § 11 I), like the Federal Civil Rights Act of 1871 (42 U.S.C. 1983), by its terms admits of no immunities. The court ruled, however, that the legislature in passing that statute did not intend to abrogate a tradition of judicial and prosecutorial immunity rooted in history and based upon sound considerations of public policy, and hence ruled that a prosecutor's aboslute common law immunity extended to claims brought

under the Massachusetts Civil Rights Act. The court for that reason found no need to decide in that case whether to accept, for purposes of G.L.c. 12, § 11 I, "the more recent approach" of the Federal courts under § 1983, or the somewhat broader "performance of official duties" test under the state common law.

I presume that the legislature also did not intend to abrogate the common law and statutory qualified immunities of non-judicial and non-prosecutorial public officers which existed when the Massachusetts Civil Rights Act was enacted, so some form of immunity is applicable to claims against such officers under that statute in appropriate cases. In this case, however, for reasons stated above, Forastiere is not immune from liability for the claim made by the plaintiff under either the federal approach or the state approach, so he is likewise not immune from the § 11 I claim.

(d) Conclusion

An order is to be entered declaring that the defendant Forastiere is *not* immune from liability under Counts II, III, IV or V of the complaint for damages resulting from any delay in the plaintiff's reinstatement as a firefighter of the City of Springfield caused by the defendant and motivated by the defendant's desire to coerce the plaintiff into abandoning or foregoing the pursuit of a civil claim for damages against either the City of Springfield or the Fire Commission.

II. Motion for Reconsideration of Summary Judgment
(a) The Claim of Privilege

In addition to requesting a pretrial determination of immunity, the defendant has moved for reconsideration of the partial denial of his motion for summary judgment. He urges in particular that he is entitled to summary judgment on Counts II and III of the complaint, both of which charge a malicious

interference with the plaintiff's contract of employment with the City because any such interference was privileged as part of his responsibility as a Fire Commissioner and because there is no evidence (he says) that his actions were motivated by "actual" malice in the sense of malevolence, spite or ill will. He relies on such cases as *Gram* v. *Liberty Mutual Insurance Company*, 384 Mass. 659, 429 N.E.2d 21, 24 (1981) and *Steranko* v. *Informex, Inc.*, 5 Mass. App. Ct. 253, 362 N.E.2d 222, where it was held that a corporate executive acting to induce the discharge of an employee of the corporation enjoys a qualified privilege and may not usually be held liable to the employee for such action. In those cases the court pointed out, however, that the privilege will be lost if the executive acts out of actual malevolence or malice toward the employee.

I assume that although the cases cited by the defendant all involved officers and employees of private corporations, a fire commissioner of a city enjoys a similar privilege in dealing with officers or employees of the city's fire department. The privilege, as the defendant himself notes, closely resembles the common law immunity of public officers performing discretionary functions as described in *Gildea* v. *Ellershaw, supra*. It serves the same purpose because it is designed to assure that the freedom of corporate officers in the performance of their corporate duties will not be curtailed by fear of personal liability. The immunity, however, is a qualified one and will be lost if the public official acts in bad faith as well as if he acts out of actual malice. There may be, in other words, improper motives other than hatred or ill will which will result in a loss of the immunity. I believe that the same is, or should be, true of the privilege.

The Supreme Judicial Court intimated that it was true of the privilege in *Owen* v. *Williams*, 322 Mass. 356, 77 N.E.2d 318, 321 (1945). In that case Chief Justice Qua, speaking for the court, said that it is "unnecessary to consider whether, if

the defendant had a privilege of some kind, he exceeded its limits in what he did, *or* whether the jury could find that he lost any privilege by resort to improper means *or* that he was so far actuated by express malice that all privilege ceased." (Emphasis supplied). I note also that in *Tobin* v. *Goggins*, 17 Mass. App. Ct. 996, 459 N.E.2d 835, 836 (1984), the Appeals Court approved the judge's charge on malicious interference with contractual rights which spoke of "bad faith" and "malice" in the alternative.

If Forastiere is shown to have acted in the manner and for the reasons claimed by the plaintiff, he can be found to have lost any privilege he may have had for the same reasons that he can be found to have forfeited any common law immunity. A jury could find that he acted in bad faith and could also infer he acted out of actual malice if such an inference is necessary.

It follows that Forastiere is not entitled to summary judgment on the basis of any claim of privilege any more than he is entitled to summary judgment on the basis of an immunity from liability.

(b) The Misfeasance-Nonfeasance Distinction

Forastiere further argues that if his function in acting on the plaintiff's request for reinstatement is held to be ministerial or nondiscretionary, he is entitled to summary judgment on the basis of the old common law misfeasance-nonfeasance distinction. I do not agree.

It is true that public officers performing nondiscretionary functions are *not* immune from liability for intentional torts, including, specifically, malicious interference with contractual rights, under the new Massachusetts Tort Claims Act. The legislature decided as a matter of policy that they should be personally liable for intentionally committed wrongs, but it does not follow that the legislature intended to preserve the old misfeasance-nonfeasance rule. That rule was only applicable in the context of negligent acts or omissions in any event,

but even in that context its soundness had been expressly questioned by the Supreme Judicial Court in *Whitney* v. *City of Worcester*, 373 Mass. 208, 366 N.E.2d 1210, 1218 (1977), at the time when the Massachusetts Tort Claims Act was enacted.

In this case we are not dealing with a charge of negligence. We are dealing with a charge of intentional conduct. What is alleged is a deliberate interference by Forastiere with the plaintiff's right to immediate reinstatement. That is much more than mere nonfeasance even if the old rule is somehow still alive.

(c) The Nature of the Reinstatement Function

The defendant does not really contend that the misfeasance-nonfeasance rule is applicable in this case. On the contrary, he argues that Forastiere was performing a discretionary function in acting on the plaintiff's reinstatement, and in support of that argument he quotes Mr. Justice Lummus who wrote in *Ferrante* v. *Higgiston*, 296 Mass. 208 (1936) at page 209:

> Reinstatement is not of right, but requires concurrent action of the appointing officer and the Commissioner of civil service.

Judge Lummus, however, as the defendant concedes, was speaking of an earlier version of what is now G.L.c. 31, § 37 and of a now extinct rule of the Civil Service Commission when he wrote that language. The rule in question provided for the establishment of a Special List of persons who had been "separated from the service" without fault and delinquency on their part, and went on the provide:

> With the consent of the Commissioner, upon good cause shown, an apponting office *may* reinstate in the same position or in a position in the same class

> or grade any person *who has been separated from the service*. . . .

Dunn v. *Commission of Civil Service*, 279 Mass. 504, 507-508 (1932) (emphasis supplied). That rule, as Judge Lummus pointed out, had been previously interpreted by the court in *Skold* v. *Chief of Fire Department of Cambridge*, 266 Mass. 513 (1929), and in that case the court had held that reinstatement was not a matter of right but required concurrent action of the appointing authority and the commission. The statute in question (then G.L.c. 31, § 46E) had been enacted in 1934 (St. 1934, c. 207) and merely provided that a leave of absence for a period of less than six months was not to be deemed a "separation from service." In the case Judge Lummus was deciding, Higgiston, the employee, had been on leave of absence for considerably more than six months at the time in question. Section 46E was a forerunner of what is now Section 37.

Under the rule and statute in effect in *Ferrante* v. *Higgiston, supra*, reinstatement was quite obviously a discretionary matter. The rule used the discretionary word "may" and the time limitation imposed by the statute had expired. The statute in effect in this case is quite different. Its language is mandatory and there is no six month limitation. The language quoted by the defendant has been taken out of context and does not state the current law. In fact, when considered as part of the legislative history of the present statute (§ 37), it indicates a progressive tendency on the part of the legislature to extend the length of leaves of absence at the termination of which reinstatement would be required, and hence tends to reinforce the position that such reinstatement is now a ministerial and no longer a discretionary function.

(d) The Issue of Causation

The defendant further argues that there is no evidence that Forastiere, as distinguished from the entire five-member Fire

Commission, held up the plaintiff's reinstatement, and suggests that the plaintiff must produce some evidence to that effect to escape summary judgment. It is true, of course, that in order to ultimately prevail in his action against Forastiere, the plaintiff will have to prove that Forastiere caused the delay in his reinstatement, either by casting or refusing to cast a deciding vote or by exerting his influence on his fellow commissioners or in some other manner. That is a question of fact which remains to be resolved. The defendant has produced nothing by way of affidavit or otherwise to indicate the absence of such a factual issue. On a motion for summary judgment the burden, in the first instance, rests upon the moving party to establish the absence of a legitimate issue of material fact. The defendant has failed to do so.

The cases cited by the defendant in this regard, *New England Box Co.* v. *C & R Construction Co.*, 313 Mass. 696 (1943) and *Alphen* v. *Shedman*, 330 Mass. 608 (1953), are both inapposite. Both stand for the proposition that members of a public board must make their decisions jointly, or at least by a majority vote taken at a duly constituted meeting, but neither involve a claim against an individual member of such a board for an alleged abuse of his position. A member of a public board is not, in my opinion, absolved from civil responsibility to a person injured by his malicious interference with that person's contractual relationships or by his violation of that person's civil rights merely because he acted in concert with his fellow board members in so doing.

(e) The Claim of an Adequate State Remedy

The defendant now argues that the plaintiff's claim under 42 U.S.C. § 1983 (Count IV of the Complaint) should be dismissed under the principle enunciated by the Supreme Court in *Parrott* v. *Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) because the plaintiff had an adequate remedy

under state law. In *Parrott* the court held that a plaintiff may not maintain an action under § 1983 for an alleged deprivation of property without due process of law in violation of the Fifth Amendment if under state law he had an available remedy. In my original Memorandum and Order in this case I ruled that for that reason Forastiere could not be held liable to the plaintiff on Count IV on the basis of deprivation of due process.

The claim that the plaintiff now seeks to pursue, however, is not a claim under the Fifth Amendment for deprivation of property without due process of law but rather a claim of interference or attempted interference with his First Amendment right of access to the courts by the exertion of economic force. The existence of a property (or liberty) interest is irrelevant to First Amendment claims. *Perry* v. *Sindermann*, 408 U.S. 953, 92 S.Ct. 2694, 33 L.Ed.2nd 570 (1972). Even if the plaintiff had had no right to reinstatement when he was acquitted of the charges against him, there are some reasons for which it could not be denied him. A state or municipal officer may not, under color of state law, deny a benefit to a person for a reason that infringes his constitutional protected interests, and that includes his interest in access to the courts for a redress of grievances. Where, as here, the person did have a right to the benefit he sought (reinstatement), the infringement of the constitutionally protected interests is magnified and aggravated.

Where an individual proves that a governmental benefit has been denied him for constitutionally impermissible reasons, that individual is entitled to appropriate remedies under 42 U.S.C. § 1983 (*Rzeznik* v. *Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128, 1135 [Rzeznik I]); and those remedies may include the imposition of punitive damages. *Rzeznik* v. *Chief of Police of Southampton*, 10 Mass. App. Ct. 335, 407 N.E.2d 389, 391 (1980) (Rzeznik II).

Punitive damages may be awarded in certain circumstances when the violation of an individual's constitutional rights is aggravated by actual malice, evil intent, deliberate oppression, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff. *Rzeznik II, supra*. He may be entitled, in other words, to more than mere compensatory damages for any property loss or liberty loss sustained. He may also be entitled to monetary vindication for the affront to his First Amendment liberty. A civil action for malicious interference with contract does not provide such vindication.

In support of his motion for reconsideration the defendant argues that the plaintiff's claim under the Massachusetts Tort Claims Act is also barred by the existence of an adequate remedy. That argument is mistaken for the same reasons that his argument with regard to the § 1983 claim is mistaken. It should be noted, however, that under the Massachusetts statute the defendant could also be held liable on the basis of an interference or attempted interference with the plaintiff's right of access to the courts as guaranteed by Article XI of the Declaration of Rights.

Accordingly it is ordered that the defendant's motion for reconsideration of summary judgment be, and the same hereby is, denied.

/s/ John F. Moriarty
John F. Moriarty
Justice of the Superior Court

Entered: March 11, 1986.